STATE OF MICHIGAN

COURT OF APPEALS

BARBARA HAAKSMA,

Plaintiff-Appellant,

v

CITY OF GRAND RAPIDS and FRYLING DEVELOPMENT CORPORATION, a/k/a 50 MONROE PLACE PARTNERSHIP,

Defendant-Appellants,

and

CITY OF GRAND RAPIDS,

Cross-Plaintiff,

v

FRYLING DEVELOPMENT CORPORATION, a/k/a 50 MONROE PLACE PARTNERSHIP,

Cross-Defendant.

FOR PUBLICATION
July 24, 2001
9:15 a.m.

No. 222450
Kent Circuit Court
LC No. 98-007045-NO

Updated Copy
October 12, 2001

Before: Saad, P.J., and Fitzgerald and O'Connell, JJ.

FITZGERALD, J. (*concurring in part and dissenting in part*).

I concur with the majority's conclusion that the trial court properly granted summary disposition for the city under MCR 2.116(C)(7). I respectfully disagree, however, with the majority's conclusion that summary disposition was properly granted for Fryling Development Corporation under MCR 2.116(C)(10).

Summary disposition under MCR 2.116(C)(10) is appropriate if there is no genuine issue of material fact. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits,

depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

Plaintiff alleged negligence by Fryling resulting in injuries to plaintiff. Plaintiff stepped on exposed electrical wires protruding from a pedestal that had held a lamppost that had been knocked down. Fryling had an electrical worker cap and wrap the wires with electrical tape, place a plastic bag over the wires, and cover the entire repair with an orange cone. Fryling then placed the lamppost in the basement of its building. After these steps were taken, no further work on the lamppost, pedestal, or wires was performed, and the city was not contacted regarding the situation. At the time of plaintiff's injuries, the orange cone that had covered the wrapped wires was missing, the plastic bag was torn, and the wires were exposed.[1] Plaintiff argued that the temporary repair increased the risk of injury to pedestrians by concealing the hazard and hiding the evidence that would have placed the city on notice of the need for repair.[2]

There is no dispute that Fryling did not have a duty to repair a defect in the abutting public sidewalk. *Bivens v Grand Rapids*, 443 Mich 391, 395; 505 NW2d 239 (1993). However, a landowner may be liable if, in seeking to correct a defect, the landowner actually creates a new hazard or increases the original hazard. *Ward v Frank's Nursery & Crafts, Inc*, 186 Mich App 120, 131-134; 463 NW2d 442 (1990).

In *Kinsey v Lake Odessa Machine Products*, 368 Mich 666, 667; 118 NW2d 950 (1962), the Court addressed a case similar to the present case:

> Plaintiff . . . [alleged] negligence by defendant resulting in damage to plaintiff's vehicle. The left rear dual wheel of plaintiff's semitrailer fell into a hole in the public right-of-way within close proximity of defendant's driveway. The hole was for drainage of surface water. Some months before the accident the metal grating had broken. Defendant had placed a metal drum for a lid over the hole. At the time of the accident . . . the drum had become flattened and insecure. Plaintiff alleges that the makeshift lid was covered by a light snow-fall which

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[1] Testimony was presented that it appeared that a snowplow or some other vehicle may have scraped the cone, tearing the plastic bag and exposing the wires

[2] Unlike the majority, I do not believe that Fryling is being "penalized for subsequent, intervening acts of an unknown third party who negated the repair." *Ante* at ___. Further, I question the majority's conclusion that "[t]o make Fryling responsible for unknown intervening events that caused the wires to, once again, be exposed would create a duty where none existed originally", *ante* at ___, in light of the Court's holding in *Kinsey v Lake Odessa Machine Products*, 368 Mich 666; 118 NW2d 950 (1962). In *Kinsey*, the defendant placed a metal drum for a lid over a hole where a metal grating had broken. By the time the plaintiff's vehicle was damaged as a result of a tire falling into the hole, the drum had become flattened and insecure and snow had hidden the lid. Clearly, intervening events caused the hole to once again be exposed. Nonetheless, the Court held that a question of fact existed with regard to whether the defendant breached the duty to see that the altered condition did not constitute a new hazard or one more dangerous than before.

> resulted in the defective condition being completely hidden and "dangerous to vehicular traffic entering or leaving the premises of defendant."

The Court, noting that the defendant's attempt to alter the hazardous condition resulted in a duty to see to it that the altered condition did not constitute a new hazard, or one more dangerous than before, stated:

> It is a question of fact, in this case, therefore, whether the use of the oil drum as alleged, under the conditions prevailing, constituted a breach of duty owed to plaintiff; further, if there was such a breach, whether it was the proximate cause of the injury and damage. [*Id.* at 670.]

Here, reasonable minds could differ regarding whether Fryling's actions in removing the fallen lamppost and temporarily capping and covering the exposed wires increased the hazard. A reasonable juror might also determine that Fryling increased the hazard on the basis that Fryling concealed the existence of a defect, resulting in the failure of the city to repair the defect because of lack of notice of the defect. As stated by Justice Cardozo in *Marks v Nambil Realty Co, Inc*, 245 NY 256, 259; 157 NE 129, 130 (1927), and quoted in *Ray v Transamerica Ins Co*, 46 Mich App 647, 658; 208 NW2d 610 (1973):

> His [plaintiff's] case is made out when it appears that by reason of such negligence what was wrong is still wrong, though prudence would have made it right. . . . The inference is permissible that the [conduct by defendant] cloaked the defect, dulled the call to vigilance, and so aggravated the danger.

Although this statement was made in a different context, I find it to be equally applicable in the present case where Fryling attempted to alter the hazardous condition and, in doing so, concealed the hazard, thus thwarting a proper repair by the city. Accordingly, because a genuine issue of material fact exists, summary disposition in favor of Fryling was not appropriate. I would reverse that part of the order granting summary disposition in favor of defendant Fryling Development Corporation.

/s/ E. Thomas Fitzgerald